IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 583 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMJI SURA SOLANKI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 583 of 1997
MR NITIN M AMIN for Appellant No. 1
MR KB ANANDJIWALA for Appellant No. 2
MS HARSHA DEVANI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 09/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. This appeal is directed against the judgment and order of conviction recorded by the Ld. Addl. Sessions Judge, Kutch at Bhuj against the appellants in Sessions Case No. 14 of 1996 by judgment dated 25th April, 1997. The appellants have been convicted for committing offence under Section 302 read with section 114 of the Indian Penal Code [for short 'IPC']. They have been sentenced to suffer rigorous imprisonment [RI] for life and to pay fine of Rs.5,000/= each, in default to suffer simple imprisonment for six months. Alongwith the present appellants one Ratan Dala Goyal, original accused no. 3 was also tried for the said offences, but he has been acquitted by the learned trial Judge.

2. The case of the prosecution in nutshell can be stated as under :-

2.1. On 27th September, 1995 the prosecution witnesses Petha Sura Makwana and Rana Ratan Makwana had gone to see Garbi near Bhimasar post office. It was around 11.00 p.m. At that time they were joined by deceased Prabhu Keyna. After watching the Garbi they started back going home at around 11.30 p.m. They were walking ahead, followed by Prabhu Keyna. After going some distance they heard a shout from Prabhu Keyna and they turned back and immediately rushed towards him. When they went near the deceased, they found that appellant no. 1 had given a knife blow on the stomach, whereas appellant no. 2 and original accused no. 3 had caught the hands of the deceased. When they went near the deceased, appellant no. 1 also caused injuries to Petha Sura Makwana and original accused no. 3 gave knife blow to him. Similarly Rana Ratan Makwana was also injured with knife by original accused no. 3. On account of the injuries they fell down on the ground. One Dayabhai Bhavanbhai Makwana came there with Bhikha Ratan Makwana. They brought one tempo and removed the injured witnesses to Rapar Government Hospital. From Rapar hospital injured witness Petha was shifted to Government Hospital at Bhuj. In the meanwhile, it appears that a Janvajog entry was given at Bhimasar police station regarding the incident. Police Sub Inspector K.N. Solanki, who was maintaining Bandobast on account of Navratri festival at Rapar, was therefore, instructed to go to Rapar as the P.S.O. Rapar Police Station had received information from Bhimasar Police

Station with regard to the said incident and the injured persons were brought to Rapar Government Hospital. P.S.I. Solanki, therefore, proceeded to Rapar hospital and recorded the complaint, which was given by Petha Sura. He thereafter, proceeded to investigate into the matter and also got dying declaration recorded by the Executive Magistrate of Petha Makwana. He also went to the Ramji Mandir chowk where Prabhu Keyna was lying dead on account of the injuries sustained by him. The P.S.I. Solanki summoned two panchas and drew the inquest panchnama in their presence. When he was about to send the dead body to Bhimasar Government Hospital, Mr. R.D. Gohil, the P.S.I., Bhimasar Police Station arrived there and further investigation was entrusted to him by Mr. Solanki. P.S.I. Gohil carried out rest of the investigation and on completion of the same, submitted charge-sheet against the present appellants and original accused no. 3 for the aforesaid offences in the Court of the concerned Magistrate, who in turn committed the case to the Court of Sessions as offence under section 302 of the IPC is exclusively triable by the Court of Sessions.

2.2. The Ld. Addl. Sessions Judge, Kutch at Bhuj framed charge against the appellants and original accused no. 3 at Exh. 1 dated 28th February, 1997. The appellants and original accused pleaded not guilty to the charge and claimed to be tried.

3. At the trial, the prosecution, in support of its case, placed reliance on oral as well as documentary evidence. It examined 21 witnesses. It also produced various documents such as Janvajog entry, complaint recorded at Rapar hospital, various panchnamas, post mortem notes, etc. After recording of the evidence was over, the appellants and accused no. 3 were put all the incriminating circumstances appearing against them in the evidence in their further statements recorded under Section 313 of the Code of Criminal Procedure. It appears that their defence was that of a general denial. Moreover, in the cross-examination it was suggested that they have been falsely implicated in the present case at the instance of one Kumbha Bhavan because of political rivalry.

3.1. At the end of the trial, the learned Judge came to the conclusion that the prosecution had established its case against the present appellants beyond a reasonable doubt and he, therefore, convicted them for the aforesaid offences and passed order of sentence of life imprisonment as stated above. The original accused no. 3, however, was acquitted on the

ground that there was no evidence against him. It is this judgment and order of conviction and sentence which are challenged in this appeal.

4. We have heard Mr. K.B. Anandjiwala and Mr. N.M. Amin, learned advocates for the appellants nos. 2 and 1 respectively and also Miss Harsha Devani, Ld. APP for the respondent - State. It is submitted by Mr. Anandjiwala that the entire case of the prosecution is concocted at the instance of one Kumbha Bhavan because of the political rivalry. He has submitted that even the prosecution evidence is very doubtful and it cannot be relied upon for basing conviction for an offence under section 302. It is his submission that despite adequate opportunities, the prosecution witnesses have not informed the police about the incident at the earliest and the complaint in the case is recorded at a belated stage to suppress the real origin of the incident and also the real culprits. According to him, there clearly appears to be two incidents. In the first incident the two injured witnesses seem to have received injuries around between 8.00 and 10.00 p.m. as they have been treated at the Rapar hospital around 11.30 p.m.; whereas the second incident has taken place at about 11.45 p.m. wherein the present deceased is killed. He has, therefore, submitted that the two eye witnesses could not have witnessed the incident as they at that time were taking treatment at Rapar hospital. He has also submitted that the scene of offence is also changed since no blood stains have been found at that place where deceased is alleged to have been assaulted and at the place where deceased was found lying almost in dead condition and also at the place where the injured persons were lying waiting for help. Lastly he has submitted that the earliest version before the police is deliberately suppressed by prosecution and the complaint is recorded at a belated stage to falsely implicate the present appellants. He, therefore, submits that this appeal is required to be allowed. His arguments have been adopted by Mr. N.M. Amin.

4.1. As against that, Miss Harsha Devani, Ld. APP has supported the judgment and has submitted that no error has been committed by the trial Court in convicting the appellants for aforesaid offences and to sentence them for imprisonment for life with fine. She has also submitted that the evidence of eye witnesses is duly corroborated by medical evidence. According to her, when the eye witnesses themselves are injured, there is no reason to doubt their presence at the scene of offence at the time of incident. Lastly she has submitted this

appeal has no merit and it is required to be dismissed.

5. We have carefully gone through the entire record of the appeal including the evidence with a view to reappreciate it. We have also given our careful consideration to the submissions made by the learned advocates. It clearly appears from the record that deceased Prabhu Keyna Rajput lost his life in the incident which took place on 27th September, 1995 at village Bhimasar at about 11.45 p.m. The evidence of the Prosecution Witness Petha Sura Makwana P.W. 1 Exh. 10 clearly shows that this witness had gone to watch Garbi near Bhimasar Police Station line and from there to a place near Bhimasar post office in company of one P.W. Rana Ratan Makwana. They were joined by the deceased Prabhu Keyna while they were seeing the Garbi near Bhimasar post office. At about 11.30 p.m. when they were returning Prabhu Keyna i.e. the deceased was following them. Near Bhimasar Ramji Mandir they heard shouts of Prabhu Keyna and turned back and saw that appellant no. 2 and original accused no. 3 had caught the hands of Prabhu Keyna and appellant no. 1 had inflicted knife blow on the stomach region. He has stated that when they went near the deceased, he was caused injuries by appellant no. 1 on the right shoulder, whereas appellant no. 2 caused him injury on the left shoulder. The third person had also caused injury on his back, but he was not able to identify him. He has further stated that P.W. Rana Ratan Makwana was also assaulted with knife by third unknown person. On account of the injuries sustained by them, they had fallen down on the ground. It is his evidence that P.W. Daya Bhavan Makwana and Bhikha Ratan Makwana came there and they took both of them i.e. this witness and Rana Ratan Makwana in the tempo for being taken to the hospital. According to this witness, Prabhu Keyna had already died at that time. They were removed to Rapar Government Hospital where treatment was given and thereafter this witness was shifted to Bhuj hospital. At Rapar his dying declaration was recorded and also his complaint by P.S.I. Solanki. According to the witness, the motive for assault was that about a year back truck of the appellant no. 1 had got stuck in the sand and he had requested Prabhu Keyna to help him taking it out, but the deceased had refused to render any help. As a result of that there was enmity between them. This witness has identified the appellants in the Court room as accused who had assaulted him. In the cross-examination it was asked whether it was original accused no. 3 who was also involved in the case, to which he has given answer in the negative. In the cross-examination he has further stated

that all three persons, who assaulted them, had knives with them. He has been asked that he had not stated in his police statement that the hands of Prabhu Keyna were caught by appellant no. 2 and other person. In the cross-examination by original accused no. 3 he has given clean-chit to accused no. 3. He has been asked that the Bhimasar Police Station is very near to the place where they were lying and he has answered in affirmative.

5.1. Prosecution has also examined Rana Ratan Makwana P.W. 2, Exh. 12. He has also deposed on the same line in examination-in-chief. In the cross-examination it was suggested to him that despite the fact that the police of Bhimasar Police Station approached them, they had not given the complaint because they did not know who the assailants were. This suggestion has been denied by him. Despite his cross-examination, the defence has not been able to elicit anything of importance from this witness.

5.2. Prosecution has examined Dr. Khimajibhai Dudabhai P.W. 3 at Exh. 13. At the relevant time he was working as Medical Officer at Rapar Community Health Centre. According to him, at about 11.30 p.m. Petha Sura Makwana i.e. injured witness had come to take treatment. He has further stated that since it was the injured who suffered an assault, he had informed the Bhimasar Police Station about it. Upon examination he has found five injuries on the person of the injured which have been adequately described in his evidence. These injuries were all cut wounds and in his opinion, these injuries could be caused by sharp cutting instrument. He has further opined that these injuries could have been caused about one and half to three hours before and they were bleeding injuries. He has produced the medical certificate of Pethabhai, which is duly exhibited at Exh. 14.

5.2.1. He has also stated that on 27th September, 1995 he had examined Rana Ratan Makwana around 11.50 p.m. Since he had sustained injuries in assault, he had informed the Bhimasar Police Station. Upon examination he has found one cut injury on the right side buttock. He had issued medical certificates in respect of this witness, which is at Exh. 15. In the cross-examination he has admitted that the cut wound and puncture wound are different kinds of injuries. He has further admitted that cut wound could be caused either by Dhariya or knife i.e. sharp cutting instrument. He has further admitted that in the case papers it was stated that somebody had assaulted the injured.

5.3. Mr. Dayalji Naranji Parmar P.W. 4 Exh. 16 is the Executive Magistrate, who recorded the dying declaration of P.W. Petha Sura. From his evidence it appears that the dying declaration was recorded on oath and at the time of recording it, the relatives of the witness were not present.

5.4. Dr. Narendrakumar Dolatram is P.W. 5 Exh. 20. At the relevant time he was working as Medical Officer, Bhuj Civil Hospital. He had received Yadi from Medical Officer, Rapar Community Health Centre referring Petha Sura Makwana. He was admitted as indoor patient. On examination, he had found three injuries, which have been described in his evidence. According to him, these injuries were of simple nature.

5.5. Dayabhai Bhavanbhai Makwana P.W. 7 Exh. 27 is the person who went to the scene of offence near Ramji Mandir on hearing the shouts. He had seen witnesses Petha and Rana Ratan going towards Ota of Mangalji's shop in injured condition. He brought the tempo to remove the injured persons to Rapar hospital. He again removed witness Petha Makwana from Rapar hospital to Bhuj and at that time Petha had told him that it was appellant no. 1 who had caused him injuries. In the cross-examination the defence has tried to suggest to him that they were falsely implicating the appellants because of the political rivalry and that too at the instance of one Kumbha Bhavan, who happened to be the elder brother of the witness. This suggestion has been denied. He has stated that he had no interest in politics. The defence has also brought out certain contradictions vis-a-vis his police statement.

5.6. P.W. 8 Mohanbhai Dudabhai Exh. 28 has deposed that he had gone to Rapar with the injured persons in tempo. In the cross-examination he has voluntarily admitted that before going to Rapar they had stopped at police station for sometime.

5.7. P.W. 9 Ghela Jogabhai Makwana Exh. 29 is a witness who had learnt about the incident from the talks which were going on in that locality. He, therefore, went to see the injured persons but he could not find them since they had already left for hospital. He came to know names of four persons including the present appellants and accused no. 3, who were responsible for causing assault on the deceased as well as injured witnesses. He, therefore, approached the police station and gave Janvajog entry involving the

present appellants and others in the incident. In the cross-examination it has been suggested to him that he had also gone to Rapar in the tempo alongwith the injured witnesses, but he has denied.

5.8. Over and above this, the prosecution has examined various witnesses who had acted as panchas in different panchnamas but they have turned hostile and not supported the prosecution. We, therefore, do not deal with their evidence in this judgment.

5.9. The next important witness is Dr. Rajendrasing Bhagvandas Kashyap P.W. 19 Exh. 57, who has performed the autopsy of the dead body of Prabhu Keyna on 28th September, 1995. This witness has adequately described two injuries suffered by the deceased. According to him, one injury was in the nature of punctured wound on the left hand side of chest just below the nipple between 5th and 6th ribs. The injury was 3 cm x 2 cm x 4 cm. The second injury was an abrasion on the face between left side nose and medial angle of eye of 2 cm. x 0.5 cm. In his opinion, these injuries could have been caused about 8 to 10 hours prior to the post mortem examination. In his opinion, injury no. 1 could be caused by pointed sharp instrument, whereas injury no. 2 could be caused by sharp and less pointed instrument. He has been shown article no. 10 and in his opinion injury no. 1 could not be caused by said article. It may be noted here that it is the knife alleged to have been used by appellant no. 1. He has further stated that because of the injury on the chest, the internal organs were damaged. The left side lung was punctured on account of the knife blow. It had cut the pleura of the left side and the left chamber of the heard was empty. In the stomach semi-digested food was present. This witness has further stated that the death was caused on account of the excessive bleeding due to injury on the chest. In the cross-examination he has agreed to the suggestion that if there was no excessive bleeding from injury no. 1, the deceased could have survived.

5.10. P.W. 20 Bavu Dungar Makwana Exh. 60 has been examined because the deceased had fallen down outside his house and this witness had gone to him immediately after he had fallen down. The witness has stated that he went out of the house on hearing some noise and when he went there, he had seen the deceased lying on his stomach on the floor. He was faintly breathing. However, when he was turned up side, he had breathed his last.

5.11. Kanaji Naranji Solanki, P.W. 18 Exh. 49 is Police Officer i.e. P.S.I. attached to Rapar Police Station. He had received message to come to Rapar Police Station to visit the injured persons as incident of murder had taken place at Bhimasar. He went to Rapar and contacted the injured and recorded the complaint of Pethabhai. He also made arrangement for getting the dying declaration of Pethabhai recorded. He drew the inquest panchnama and when he was making arrangement to send the dead body to hospital, P.S.I. of Bhimasar police Station arrived there and took over the investigation. Nothing of any importance has been elicited from the evidence of this witness by the defence.

5.12. Raghuvirsinh Danubha Gohil, P.W. 21 Exh. 63 has carried out rest of the investigation. On 27/9/1995 he was engaged in the Bandobast on account of Navratri festival. He was asked by Dy. S.P. Bhuj to immediately proceed to Bhimasar Police Station. When he came to Bhimasar he took over the investigation from P.S.I. Solanki and upon completion of the same, submitted charge-sheet in the Court of the concerned Ld. Magistrate. He has also been cross-examined by the defence but nothing substantial has been brought out from him.

6. Thus, having gone through the entire evidence and considering the fact that the evidence of the aforesaid eye witnesses who have also received injuries cannot be doubted because defence has not been able to shake them in the cross-examination. Further their evidence has been duly corroborated by medical evidence. There is nothing on record to show that these witnesses could not have been there at the time when the incident took place. Though it is submitted by Mr. Anandjiwala that the medical record of Rapar hospital shows that they were admitted at about 11.30 p.m. when the incident alleged to have taken place at that time at Bhimasar, we are of the opinion that such discrepancy in the timing may not render the entire evidence of these witnesses unreliable, especially when the medical evidence supports their version. It may also be noted that no such suggestion has been put to these witnesses to enable them to explain this discrepancy. In absence of such case by the defence, we have no reason to accept the submission of Mr. Anandjiwala. It may also be noted here that though injuries suffered by Petha Sura ultimately turned out to be simple injuries, the witness himself had got very much scared as he had seen the deceased immediately after the assault, lying in injured

condition and those very persons had assaulted him causing injuries to him also. Because of this anxiety though they may have desired to disclose the fact to the police immediately but their first and foremost anxiety was to obtain treatment from the hospital. We are also not impressed with the submission regarding belated complaint made by Mr. Anandjiwala, because considering the fact that the incident had taken place around 11.40 to 11.45 p.m. and the persons were removed to the hospital almost immediately, they were not in a mood or condition to lodge the F.I.R. with the police at the earliest. The complaint which is recorded by P.S.I. Rapar Police Station has not been exhibited. However, Janvajog entry which is first in point of time was exhibited and relied on by the trial Court. It discloses cognizable offence and also the names of the culprits and atleast the names of the appellants at the earliest. We, therefore, do not have any reason to discard the evidence of the prosecution witnesses on the ground of belated F.I.R.

7. The question that now requires to be decided is whether the evidence of the prosecution witnesses conclusively prove that it is appellant no. 2 who had caught hands of the deceased to enable accused no. 1 to deliver fatal blows to deceased. The injured witnesses have assigned this role to the appellant no. 2. However, they have given clean-chit to original accused no.3, who is also alleged to have caught hands of deceased with the said purpose. Therefore, to that extent renders their evidence doubtful. Admittedly appellant no. 2 has not played any other role to cause injuries to the deceased. It is, therefore, difficult to sustain the conviction recorded by the trial Court of this appellant under section 302 read with section 114 of the IPC and in our opinion the said finding is erroneous. At best he can be convicted for causing injury to Petha Sura on left hand side shoulder. The medical evidence shows that it was a simple injury. In view thereof, the appellant no. 2 can only be convicted for offence under section 324 of the IPC.

8. So far the appellant no. 1 is concerned, he has been convicted for offence under section 302 of the IPC. The medical evidence of Dr. Rajendra Kashyap does not give any indication that the injuries suffered by the deceased were sufficient in ordinary course of nature to cause death, though such finding has been given by the trial Court. It is dehors the evidence on record hence erroneous. This witness has on the contrary stated that if the bleeding could have been arrested, he would

have survived. Thus, in all probabilities it appears that the injuries suffered by the deceased were likely to cause death. The offence, therefore, cannot be covered under section 300 of the IPC and there cannot be any conviction under section 302 of the IPC. The finding and conviction of the trial Court on this count are erroneous. Appellant no. 1 can at best be convicted for offence under section 304 Part-I of the IPC. We, therefore, alter the conviction of appellant no. 1 from one under section 302 to section 304 Part-I of the IPC. The conviction of appellant no. 2 for the offences under section 302 read with section 114 of the IPC is quashed and set aside; instead he is convicted for the offence under section 324 of the IPC.

8.1. The jail record of appellant no. 1, which is of April 2004, shows that he has suffered imprisonment of almost 10 years by now. We are of the opinion that the ends of justice would meet if the sentence to suffer imprisonment already undergone is awarded. We, therefore, quash and set aside the sentence of life imprisonment and instead replace it with the sentence of imprisonment already undergone.

8.2. So far appellant no. 2 is concerned, with remission he has also undergone imprisonment of about 5 years and 10 months. The order of sentence of life imprisonment is therefore, quashed and set aside and instead we award him sentence of period of imprisonment already undergone.

8.3. So far fine is concerned, we retain the order passed by the trial Court in respect of appellant no. 1. However, with regard to appellant no. 2, we reduce the fine of Rs.5,000/= to Rs.1,000/=. If the appellant no. 2 has paid the amount of fine, the excess amount be returned to him. In default, both the appellants are directed to suffer simple imprisonment for two months.

8.4. In view of the above, the appellant no. 1 is ordered to be released forthwith, if not required for any other purpose. Appellant no. 2 is already on bail and hence he will now not be required to surrender to the custody. His bail bonds stand cancelled.

8.5. The result is that this appeal is partly allowed.

8.6. Muddamal articles to be disposed of as per the directions given by the trial Court in the

impugned judgment.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.